Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	
To: Wireline Competition Bureau	)	

JOINT PETITION FOR RECONSIDERATION OF THE WIRELINE COMPETITION BUREAU'S FEBRUARY 8, 2011, LETTER TO THE UNIVERSAL SERVICE ADMINISTRATIVE COMPANY

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SUMMARY

The Petitioners respectfully request the Wireline Competition Bureau ("Bureau") reconsider its decision announced in a letter dated February 8, 2011, from the Chief of the Bureau to the Vice President of the High Cost and Low Income Division at the Universal Administrative Company ("USAC") directing USAC to adjust the size of the Interim Cap on high-cost support for competitive eligible telecommunications carriers ("ETCs"). The Petitioners are each adversely affected by the Bureau's decision to retroactively modify the cap level.

The Bureau's action in ordering USAC to make a retroactive adjustment of the Interim Cap amounts to a legislative rule, which triggered the requirement for a notice-and-comment rulemaking pursuant to the Administrative Procedure Act. The failure of the Commission to institute such a rulemaking makes the Bureau's February 8 letter an unenforceable nullity.

The Commission, in establishing the Interim Cap in the *Interim Cap Order*, recognized the importance of avoiding undermining the expectations of competitive ETCs relevant to their decisions to invest in networks in rural and high-cost areas. Thus, the Commission expressly sought to avoid the imposition of any immediate funding reductions which would occur if the Interim Cap was based on support levels from prior years.

Yet the Bureau, in its February 8 letter (issued almost three years after the Commission adopted a rule establishing the Interim Cap), seeks to impose substantial funding reductions both going forward and retroactively. The requirement imposed by the Bureau not only modifies a rulemaking decision made by the Commission, but also would impose undue hardship on the Petitioners by recovering support that has already been invested in accordance with rules applicable to such support and in reasonable reliance on the Commission's prior rulemaking. By undermin-

ing these investment decisions, the Bureau's action causes the precise harm the Commission previously recognized and sought to avoid in the *Interim Cap Order*.

The Bureau's decision to retroactively modify the Interim Cap level without notice, comment, or justification, represents promulgation of a substantive rule in a manner that violates the requirements of the APA. In addition, the requirement in the February 8 Letter that the Petitioners must repay to USAC high-cost support previously disbursed to the Petitioners is an overly burdensome regulatory obligation that violates the Takings Clause of the Fifth Amendment to the U.S. Constitution.

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AST Telecom, LLC d/b/a BlueSky Communications, Bluegrass Cellular, Cellular South Licenses, LLC, Union Telephone Company, Corr Wireless Communications, LLC, East Kentucky Network, LLC d/b/a Appalachian Wireless, Illinois Valley Cellular RSA 2- I, Illinois Valley Cellular RSA 2 – II, Cellular Properties d/b/a Cellular One of East Central Illinois, Commnet Wireless, LLC, MTPCS, LLC d/b/a Cellular One, Allied Wireless Communications Corporation, Allied Wireless Communications Corporation as manager for Georgia RSA #8 Partnership, and PR Wireless, Inc. d/b/a Open Mobile (jointly, the "Petitioners"), pursuant to Section 405(a) of the Communications Act of 1934 ("Act"),[1] and Section 1.106(a)(1) of the Commission's Rules ("Rules"),[2] hereby jointly petition the Chief, Wireline Competition Bureau ("Bureau"), to reconsider a letter directive of the Bureau, released on February 8, 2011,[3] in the above-captioned pro-

[1] 47 U.S.C. § 405(a).

[2] 47 C.F.R. § 1.106(a)(1).

[3] Letter from Sharon Gillett, Chief, WCB, to Karen Majcher, Vice President, High-Cost and Low Income Div., USAC, WC Docket No. 05-337, DA 11-243 (Feb. 8, 2011) ("*February 8 Letter*" or "*Letter*").

ceeding. Alternatively, the Petitioners request that the Bureau, acting pursuant to Section 1.106(a)(1), refer the Petition to the Commission for review and disposition by the Commission.

Pursuant to Section 1.106(d)(1) of the Rules,[4] the Petitioners request the Bureau grant this Joint Petition for Reconsideration ("Petition") and take corrective action regarding the *February 8 Letter* by instructing USAC to cease any action to recover any amounts disbursed to the Petitioners, and to refrain from making any adjustment in the cap imposed by the *Interim Cap Order*[5] to the extent that such adjustment would have an adverse effect on the Petitioners.

Each of the Petitioners has standing to file this Petition pursuant to Section 1.106(b)(1) of the Rules,[6] because as demonstrated in this Petition, the interests of each Petitioner are adversely affected by the directive issued in the *February 8 Letter*.

INTRODUCTION

The *February 8 Letter* takes actions that constitute legislative action not supported by any record evidence, taken without provision of any prior public notice seeking public comment and without providing interested parties with notice of the actions being contemplated by the Bureau.

The Interim Cap on Wireless Competitive ETC High-Cost Support

Under the Commission's "identical support rule," a competitive ETC is entitled to receive, for every subscriber line that it serves in the service area of an incumbent local exchange carrier ("LEC"), "the full amount of the universal service support that the [incumbent LEC]

[4] 47 C.F.R. § 1.106(d)(1).

[5] *High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834 (2008) ("*Interim Cap Order*"), *aff'd, Rural Cellular Ass'n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009).

[6] 47 C.F.R. § 1.106(d)(1).

would have received for that customer."[7] However, in May 2008 the Commission released the *Interim Cap Order*, which capped the high-cost support that competitive ETCs in each state may receive at the annualized "level of support that all competitive ETCs were eligible to receive in that state for the month of March 2008." *Interim Cap Order*, 23 FCC Rcd at 8850 (para. 38). The cap is to remain in place only until the Commission acts in its rulemaking on comprehensive high-cost universal service support recommendations, although it should be noted that the "interim" cap has now remained in effect for nearly three years. *See id.* at 8850 (para. 37).[8]

In selecting March 2008 as the base period for the cap, the Commission rejected a recommendation of the Federal-State Joint Board on Universal Service ("Joint Board") that the cap be set based on the "level of support actually distributed in 2006." *Id*. at 8850 (para. 38). The Joint Board had reasoned in its *Recommended Decision* that "using 2006 data allows the Commission to use actual support amounts, rather than relying on USAC projections to set the cap amounts."[9] In rejecting the Joint Board recommendation to use actual (trued-up) 2006 support levels to set the cap level, the Commission explained:

> Using March 2008 data allows use of *more recent actual support amounts* than 2006. Use of March 2008 as the base period, moreover, will ensure that funding levels will not undermine the expectations underlying competitive ETC investment decisions or result in immediate funding reductions.[10]

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[7] 47 C.F.R. § 54.307(a)(3).

[8] It is important to note that, in addition to the reductions in competitive ETC support that result from the *February 8 Letter* and that are discussed in this Petition, the *Interim Cap Order* itself is having the continuing effect of making it difficult for competitive ETCs to cope with the rising costs of deploying and providing services in rural areas and to meet state commission build-out requirements imposed on these competitive ETCs in connection with their being designated as ETCs by the state commissions.

[9] *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision, 22 FCC Rcd 8998, 9003 (para. 13) (Fed.-State Jt. Bd. 2007) ("*Recommended Decision*").

[10] *Interim Cap Order*, 23 FCC Rcd at 8850 (para. 38) (emphasis added).

The December 2008 Public Notice

On December 10, 2008, the Commission released a Public Notice directing competitive ETCs to "confirm their March 2008 high-cost support amount information with USAC and file any corrections on or before December 31, 2008."[11] The *2008 Public Notice* further indicated that:

> To provide certainty regarding the amount of high-cost support available to competitive ETCs under the cap in each state, after December 31, 2008, USAC will not accept changes from competitive ETCs regarding the data on which their March 2008 high-cost support is based, absent grant of a waiver of this deadline by the Commission."[12]

The August 24, 2010, Bureau Letter

Sometime in August or September 2010, USAC posted a Bureau letter to the USAC website.[13] The otherwise unpublicized letter purported to "confirm" that USAC should adjust the Interim Cap on high-cost support for competitive ETCs. The *2010 Bureau Letter* asserted that, notwithstanding the *2008 Public Notice* directive:

> the amount competitive ETCs "were eligible to receive during March 2008" could not be finalized until the actual cost, revenue, and line count data on which the true-ups for Local Switching Support (LSS) and Interstate Common Line Support (ICLS) [High Cost support] mechanisms for that time period had been filed.[14]

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[11] Public Notice, *March 2008 Capped Universal Service High-Cost Support For Competitive Eligible Telecommunications Carriers*, WC Docket No. 05-337, CC Docket 96-45, DA 08-2684 (rel. Dec. 10, 2008) ("*2008 Public Notice*").

[12] *Id.*

[13] Letter from Sharon Gillett, Chief, WCB, to Karen Majcher, Vice President, High-Cost and Low Income Div., USAC, (Aug. 10, 2010) ("*2010 Bureau Letter*"), available at http://www.usac.org/_res/documents /hc/pdf/2010-reminders/InterimCapAdjustmentLetter.pdf.

[14] *Id*. at 1 (quoting *2008 Public Notice*).

The *2010 Bureau Letter* indicated that USAC was not able to calculate and finalize the ICLS and LSS amounts until the "spring of 2010."[15] The Bureau provided tables showing "(a) errors in the initial March 2008 calculations identified by competitive ETCs; (b) errors in the initial March 2008 calculations identified by USAC; (c) the impact of waivers granted by the Bureau during 2008 and 2009; and (d) true-ups of the LSS and ICLS mechanisms"[16] Finally, the *2010 Bureau Letter* indicated that USAC "should implement the revised interim cap *as soon as it is administratively feasible to do so*"[17] and that "USAC should conduct true-ups to ensure that competitive ETCs receive the correct amount of high cost universal service support for the entire period since the effective date of the *Interim Cap Order*."[18]

To the extent parties were even aware of this obscure Bureau directive,[19] they (including certain of the Petitioners) raised concerns to the Commission about a number of issues the directive raised.[20] The Petitioners are not aware that USAC has taken any action to implement the *2010 Bureau Letter* to date.

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[15] *Id.*

[16] *Id.* at 2.

[17] *Id*. (emphasis added).

[18] *Id.*

[19] The subsequent posting of the *2010 Bureau Letter* on the USAC website did not constitute sufficient notice of the Bureau's action to trigger the 30-day filing deadline for petitions for reconsideration. *See* 47 C.F.R. § 1.106(f). The letter was never released by the Commission or by Commission staff, since it merely was sent to USAC. Thus, there is no "release date" that would trigger the filing deadline. *See* 47 C.F.R. § 1.4(b)(2). Further, the letter was never sent to persons affected by the letter and, therefore, the date appearing on the letter cannot be construed as the beginning date of an "action" for purposes of the filing deadline for petitions for reconsideration. *See* 47 C.F.R. § 1.4(b)(5). The *February 8 Letter*, which was released to the public by the Bureau, has thus for the first time triggered the filing deadline for filing petitions for reconsideration of a Bureau action, as specified in Section 1.4(b) of the Rules.

[20] *See, e.g.*, Ex Parte Letter from David A LaFuria, counsel for on behalf of United States Cellular Corporation, N.E. Colorado Cellular, Inc. d/b/a Viaero Wireless, PR Wireless, Inc., AST Telecom, LLC d/b/a Blue Sky Communications, MTPCS, LLC, Union Telephone Company d/b/a Union Cellular, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, WC Docket No. 05-337 (dated Dec. 3, 2010); Ex Parte

The February 8, 2011, Bureau Letter

The *February 8 Letter* again purportedly "confirms" that USAC should adjust the Interim Cap. Implicitly acknowledging that the *2010 Bureau Letter* directive had not been implemented, the *February 8 Letter* explains that further errors were discovered in the data USAC had submitted.[21] The *Letter* also explains that "some parties have suggested that the specific adjustments made could have been more transparent" and that "some parties have indicated the true-ups necessary to implement the revised cap could be unduly burdensome."[22] The *Letter* indicates that it addresses these concerns and directs USAC to implement the cap adjustments "beginning with February 2011 support payments (the actual disbursements of which will occur in March 2011)."[23]

In the Bureau's attempt to address transparency concerns, the *February 8 Letter* attaches carrier level adjustments in addition to state specific adjustments.[24] The Bureau also attempts to address concerns about the impact of implementing retroactive adjustments to the cap—which for the Petitioners and others will result in substantial recoveries of support disbursed in some cases years earlier. To do so, the *Letter* adopts a collection process intended to comply with the Commission's debt collection rules, which impose procedural requirements associated with a formal demand for payment, imposition of interest and penalties, advance notice of the intent to

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Letter from Cathy Carpino, General Attorney, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, WC Docket No. 05-337 (dated Dec. 1, 2010).

[21] *See February 8 Letter* at 1.

[22] *Id.*

[23] *Id.*

[24] *See id*. at Attach. B (Interim Cap Adjustments by Study Area Code: Original Baseline), Attach. C (Interim Cap Adjustments by Study Area Code: Revised Baseline).

offset collections against disbursements ("administrative offset"), and installment payment options.[25]

ARGUMENT

The *February 8 Letter* takes actions that constitute legislative action not supported by any record evidence and without any public notice seeking comment and providing interested parties with notice of the actions being contemplated by the Bureau in connection with the proceeding.

I. THE INTERIM CAP IS A COMMISSION "RULE," WHICH CAN ONLY BE CHANGED BY THE COMMISSION IN A RULEMAKING AND AFTER NOTICE AND OPPORTUNITY FOR COMMENT.

Although the Interim Cap is not codified in the Code of Federal Regulations, it is unquestionably a "rule" for purposes of application of the Administrative Procedure Act ("APA"). The Commission considered the status of the cap just last year and expressly so held: "*The interim cap is a Commission 'rule'* pursuant to the [APA]; *i.e.*, it is an 'agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.'"[26]

Because it constitutes a "rule," the Interim Cap rule cannot be modified or amended in any way, except through a proper rulemaking proceeding. *See, e.g., Am. Fed'n of Gov't Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985) ("[A]n agency seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake similar procedures to accomplish such modification or repeal . . . .").

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[25] *See id*. at 1-2 (citing the Commission's debt collection rules at 47 C.F.R. §§ 1.1901, *et seq.*).

[26] *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Request for Review of Decision of Universal Service Administrator by Corr Wireless Communications, LLC,* WC Docket No. 05-337, CC Docket No. 96-45, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 12854, 12857 (para. 8) (2010) ("*Corr Wireless I*") (emphasis added).

II. THE *FEBRUARY 8 LETTER* CONSTITUTES A MODIFICATION OF THE INTERIM CAP RULE.

The *February 8 Letter* purports to retroactively modify the level of the cap established in the Interim Cap rule, and orders USAC to adjust the Interim Cap and to implement the adjusted cap beginning with February 2011 support payments.[27] By ordering a change in the Interim Cap, the *February 8 Letter* has the effect of creating new law and obligations. *See Fertilizer Institute v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991). Directives, such as the *February 8 Letter*, are generally considered legislative rules, not interpretative rules. *See, e.g., National Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan* 979 F.2d 227 (D.C. Cir. 1992).

The *February 8 Letter* cannot be considered merely interpretive. Viewed even in its most favorable light, the *February 8 Letter* adds provisions (true-up requirements and procedures) which were lacking in the *Interim Cap Order*. But rules which "fill in the gaps" and attempt to supplement statutes or regulations are legislative rules. *E.g., Chamber of Commerce v. OSHA*, 636 F.2d 464, 469 (D.C. Cir. 1980). But, as discussed below, the *Letter* actually changes the rule announced in the *Interim Cap Order*. As a result, the *Letter* amounts to a legislative rule, which triggers the notice and comment requirements of Section 553 of the APA. *See Chao v. Rothermel*, 327 F.3d 223, 227 (3d Cir. 2003).

According to the Bureau's calculations, carriers in most states would have the amount of capped support collectively available to them reduced, by an aggregate amount of over $4.5 million per month, or *over $140 million* in the nearly three years since the Commission established the cap.[28] The Bureau would have carriers "repay" this alleged debt within 30 days or be consid-

[27] *February 8 Letter* at 1.

[28] *See id.* at Attach. A (Interim Cap Adjustments by State). The actual total amount that competitive ETCs will be required to repay cannot be calculated with any degree of accuracy because information

ered "delinquent."[29] Each of the Petitioners operates in a state or territory in which support would be reduced as a result of the directive imposed by the Bureau in the *February 8 Letter*, and thus is adversely affected by the actions taken in the *Letter*.

This is a staggering sum for wireless competitive ETCs, especially considering that—as they are required to do by the Commission's rules—they have invested the money that was disbursed from the Commission's universal service support mechanisms over the last three years. The Petitioners had absolutely no inkling that we would be required at some future date to disgorge the support invested in good faith and in accordance with Federal law.

As the Petitioners explain in the following sections, the *February 8 Letter* is not merely an "interpretation" of the cap base, it is an amendment to the Interim Cap rule adopted by the Bureau in violation of the APA. Moreover, even assuming *arguendo* that the Bureau could mount a plausible argument that the *Letter* does not alter a Commission rule by modifying the cap—but instead seeks to interpret and apply the *Interim Cap Order*—there is no credible argument that the *Letter* constitutes a reasonable and defensible "interpretation" of the *Interim Cap Order*.

A. The *February 8 Letter* Did Not Merely Interpret, It Modified, the Interim Cap Rule, Which Was Unambiguous.

The entire "rule" established in the *Interim Cap Order*, such as it is, establishing the amount of the Interim Cap provides as follows:

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necessary to make such calculations has not been made available by USAC. Requests for the release of the necessary information have been pending with USAC for several months. The maximum collection amount is approximately $140 million, because that would be the overall amount of debt that competitive ETCs would owe if uncapped support exceeded capped support in every state for each month since August 2008.

[29] *See February 8 Letter* at 2.

> Although we adopt the Joint Board's recommendation that the cap on competitive ETC support be set at the level of competitive ETC support actually distributed in each state, rather than set such a cap at the level of support actually distributed in 2006, we find it is more appropriate to set such a cap at the level of support competitive ETCs were eligible to receive during March 2008 on an annualized basis. Specifically, for each state, the annual interim cap shall be set at twelve times the level of support that all competitive ETCs were eligible to receive in that state for the month of March 2008. Using March 2008 data allows use of more recent actual support amounts than 2006. Use of March 2008 as the base period, moreover, will ensure that funding levels will not undermine the expectations underlying competitive ETC investment decisions or result in immediate funding reductions. Further, consistent with our decision to cap competitive ETC support on an interim basis, we find it inappropriate and counterproductive to index the cap to a growth factor.[30]

Neither this paragraph—nor any other passage in the *Interim Cap Order*—contains the term "true-up" nor any discussion of a true-up mechanism in relation to the base amount of the cap. Even Appendix C to the *Interim Cap Order*, the Regulatory Flexibility Act[31] analysis, lacks discussion of the potential impact of a true-up on small business entities ("SBEs"), despite the obvious devastating impact of a $140 million true-up, much of it being imposed on SBEs.

The *Interim Cap Order* was issued pursuant to the Joint Board's *Recommended Decision*. In contrast to the Commission's *Interim Cap Order*, the *Recommended Decision did* discuss the issue of how to deal with true-ups:

> We recommend that the Commission cap competitive ETC support for each state at the level of competitive ETC support actually distributed in that state in 2006. Although this approach likely results in a lower cap in most jurisdictions than the level of support that is being distributed in 2007, we find that the need for adopting this emergency interim cap to stabilize support for competitive ETCs identified above justifies using 2006 support levels. *Moreover, using 2006 data allows the Commission to use actual support amounts, rather than relying on USAC projections to set the cap amounts. By using actual distributions over four quarters of*

[30] *Interim Cap Order*, 23 FCC Rcd at 8850 (para. 38) (footnotes omitted).

[31] 5 U.S.C. § 603.

2006, the Commission will be able to smooth out any seasonal or one-time fluctuations that may be reflected in any single quarter.[32]

Thus, the Joint Board anticipated the very issue that the *February 8 Letter* purports to address—the true-ups applied to the underlying high-cost support that incumbent LECs receive—and which formed the basis for the Joint Board's recommended Interim Cap of competitive ETC support. Unfortunately for the Bureau, the Commission *explicitly rejected* the Joint Board's recommendation that would have effectively incorporated the true-up rules by using 2006 support amounts, which had already been trued-up: "[R]ather than set such a cap at the level of support actually distributed in 2006, we find it is more appropriate to set such a cap at the level of support competitive ETCs were eligible to receive during March 2008 on an annualized basis."[33]

Thus, when squarely faced with the issue that—by picking as the basis of the cap a month for which only projected incumbent LEC support amounts were then currently known—the Interim Cap rule would fail to capture both seasonal fluctuations and true-ups, the Commission chose to do exactly that. In other words, the Commission picked as the cap base a number which was arguably arbitrary, but was readily calculable based on public data then available—explicitly rejecting a cap base that *would* account for seasonal fluctuations and true-ups.

The Commission gave two reasons for picking the March 2008 projected numbers, rather than using actual (and trued-up) 2006 numbers. First, the Commission did not want to reach back two years and set a cap that would result in immediate and drastic reductions in competitive ETC

[32] *Recommended Decision*, 22 FCC Rcd at 9003 (para. 13) (emphasis added). The Joint Board also noted that "[f]or example, *the annual true-up* of interstate common line support (ICLS) occurs in the third and fourth quarters, but not in the first and second quarters." *Id*. at para. 13 n.28 (emphasis added).

[33] *Interim Cap Order*, 23 FCC Rcd at 8850 (para. 38).

support.[34] Second, the Commission wanted to give competitive ETCs certainty and predictability regarding their support levels under the cap: "Use of March 2008 as the base period, moreover, will ensure that funding levels *will not undermine the expectations underlying competitive ETC investment* . . . ."[35] The Commission's goal of certainty, and its explicit objective of accommodating the reasonable expectations of competitive ETCs, would be destroyed if the Bureau's attempt to change the cap base retroactively by over $140 million is not reconsidered and overturned.

The Commission in the *Interim Cap Order* knew it was rejecting an approach that would have taken incumbent LEC true-ups into account in calculating the base for the cap. It could have easily added a provision stating that the cap it established based on March 2008 support would be trued-up, but chose not to include any such provisions in the Interim Cap rule. The Bureau, in the *February 8 Letter*, purports to *add* a true-up provision to the Interim Cap rule—a provision that is not in the Commission's original rule and that was explicitly rejected by the Commission in 2008.

A careful analysis of the language of the Interim Cap rule itself provides further support for the Petitioners' interpretation of the rule. First, in the opening sentence of paragraph 38 of the *Interim Cap Order*, the Commission stated, "we adopt the Joint Board's recommendation that *the cap . . . be set at the level of* competitive ETC *support actually distributed* in each state . . . ."[36] By use of the past tense ("actually distribut*ed*"), the Commission's rule set the then-known March 2008 numbers as the base for calculation of the cap. Further, the Commission said,

[34] *Id*. (footnote omitted) ("Using March 2008 data allows use of more recent actual support amounts than 2006 . . . [and will not] result in immediate funding reductions.").

[35] *Id*. (emphasis added).

[36] *Id*. (emphasis added).

"[we] set [the] cap at the level of support competitive ETCs *were eligible to receive during* March 2008 on an annualized basis."[37] Again, by using the past tense, the rule established a backward-looking mechanism.

As indicated by the *February 8 Letter*, the Bureau misinterprets the "eligible to receive" provision in the Interim Cap rule, by assuming that "eligibility" was to be determined based on future un-submitted, unknown, and indeed unknowable data. Of course, that is the scheme for ongoing support, but only because the Commission's rules expressly require true-ups in certain cases.[38] In contrast to the Commission's long-standing true-up rules for support, the Interim Cap rule does not even contain the term "true-up", let alone adopt true-up rules for the cap base. For the Bureau's interpretation in the *Letter* to be correct, the rule would have to read something like this, at a minimum:

> Specifically, for each state, the annual interim cap shall be set at twelve times the level of support that all competitive ETCs ~~were~~ will have been eligible to receive in that state for the month of March 2008, after true-up.[39]

Obviously, the rule as adopted lacks not only the proper tense to support the Bureau's interpretation, but also is utterly lacking in any language to incorporate the Commission's incumbent LEC true-up rules into the calculation of the cap.

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[37] *Id*. (emphasis added).

[38] *See, e.g.*, Section 54.301(e) of the Rules (providing for true-up adjustments of Local Switching Support); *Recommended Decision*, 22 FCC Rcd at 9003 (para. 13 n.28) (discussing annual true-up of interstate common line support).

[39] The modifications are to the text appearing in paragraph 38 of the *Interim Cap Order*. Preferably, the hypothetical rule would also cross reference the true-up rules by explicit citations, to avoid the kind of ambiguities that can arise from unspoken intentions and assumptions.

B. Even If the Interim Cap Rule Were Deemed Ambiguous, It Cannot Lawfully Be Interpreted as the Bureau Has Done in the *February 8 Letter*.

It is axiomatic that when a court or an agency is interpreting ambiguous statutes or rules, it should adopt an interpretation that is in harmony with other statutes or rules on the same subject.[40] And in particular, an agency may not adopt an interpretation of its rules that conflicts with applicable statutes.[41] Assuming, for the sake of argument, that the *February 8 Letter* is merely an interpretation or clarification of an ambiguous rule, the Bureau nevertheless was bound to adopt an interpretation of the *Interim Cap Order* that did not conflict with applicable statutes.

Regrettably for the Bureau, the *Letter* is in direct conflict with Section 254 of the Act. Specifically, Section 254(b)(5) requires that universal service support, "should be specific, predictable and sufficient."[42] The action taken in the *Letter* is under any circumstances the very antithesis of both "specific" and "predictable." It is probably also the case that in many instances it also counters the requirement that support be "sufficient." An adjustment retroactive for such a long period and in such enormous sums cannot possible be reconciled with the requirements of Section 254(b)(5).

The plain text of Section 254 of the Act mandates that the Commission "shall" base universal service policies on the seven principles listed in § 254(b).[43] Although the Commission must base its policies on the statutory principles, "any particular principle can be trumped in the

[40] *See, e.g., National Muffler Dealers Ass'n, Inc. v. U.S.*, 440 U.S. 472, 477, 99 S.Ct. 1304 (1979).

[41] *See, e.g., Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778 (1984).

[42] 47 U.S.C. § 254(b)(5).

[43] *See, e.g., Qwest Corp. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005).

appropriate case."[44] It may "balance the principles against one another when they conflict, but may not depart from them altogether to achieve some other goal."[45]

Since the *February 8 Letter* does not articulate any policy ground for reducing the Interim Cap, there is no obvious candidate in Section 254(b) to offset the principle of Section 254(b)(5). The Petitioners submit that not one principle of Section 254(b)(5) is served by reducing the cap, while Section 254(b)(5) is unquestionably thwarted. Therefore, assuming that the *Interim Cap Order* was ambiguous and requires resort to principles of rule interpretation, the Bureau's interpretation is not supportable because it is in conflict with the requirements of Section 254(b)(5) that require universal service support to be specific and predictable. The approach taken in the *Letter* creates a moving target in the extreme.

III. THE BUREAU'S DIRECTIVE THAT DISBURSED HIGH-COST SUPPORT MUST BE REPAID, BASED ON A RETROACTIVE ADJUSTMENT OF THE INTERIM CAP, VIOLATES THE PETITIONERS' CONSTITUTIONAL RIGHTS.

The *February 8 Letter* directs a retroactive adjustment of the Interim Cap and requires competitive ETCs, operating in states or territories in which downward cap adjustments are made, to pay, collectively, amounts potentially in excess of $140 million to USAC.[46] The sums USAC is directed to demand and collect from the ETCs are purportedly a portion of the disbursements they received since the Interim Cap took effect in August 2008. But in reality, because disbursements are not held in trust for USAC or the government, the sums to be demanded are private property of the competitive ETCs and therefore cannot be taken by the government absent procedural and substantive due process.

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[44] *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) ("*Qwest I*").

[45] *Qwest I*, 258 F.3d at 1200.

[46] See footnote 28, *supra*.

The sums the Petitioners would be required by the *February 8 Letter* to reimburse USAC for support have already been invested, in the states and territories in which we operate as competitive ETCs, to deploy our networks and to provide service to consumers in rural and high-cost areas. Because the Bureau has acted without notice and an opportunity for the Petitioners to respond, its demand for payment constitutes a deprivation of procedural due process, in violation of the U.S. Constitution. Moreover, because the Commission had no rule that made the disbursements conditional,[47] the disbursements became vested property of the Petitioners long ago and subject to the Takings Clause.

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Overly burdensome regulatory requirements or obligations can constitute an unconstitutional taking. *See Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) (citing *Penn Central Transportation* v. *New York City*, 438 U. S. 104, 123-25 (1978)).

Requiring the Petitioners to pay back money that we have already properly spent constitutes a regulatory taking. Although the issue of whether a taking has occurred generally involves factual inquiries into the circumstances of each particular case, *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986), three factors are central to the evaluation of a regulatory takings claim: (1) the economic impact of the regulation on the regulated entity; (2) the extent to which the regulation has undermined investment-backed expectations of the regulated entity; and (3) the nature of the governmental action. *Id*. at 225 (citing *Penn Central*, 438 U.S. at 124). The first two factors are given considerable weight, while the third factor may also be rele-

[47] Other than the obligation to spend the funds according to their lawful purposes. As discussed above, the "true-up" was nowhere provided for in the Commission's rules.

vant in deciding whether a regulatory action amounts to a taking. *See Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538-39 (2005) (citing *Penn Central*, 438 U.S. at 124).

All of the *Penn Central* factors support a conclusion that the Petitioners will suffer a taking if the repayment directive imposed by the *February 8 Letter* is implemented. First, the Petitioners will experience a significant economic impact, which will adversely affect their ability to retain customers and compete in their service areas. Second, while the *Interim Cap Order* was crafted to preserve the expectations of the Petitioners and other competitive ETCs in connection with their decisions to make network investments in rural and high-cost areas, the *February 8 Letter* conflicts with this objective by interfering with the Petitioners' reasonable expectations regarding our receipt and use of high-cost support. Third, the Bureau's action is baseless and unreasonable because it cannot be squared with the Interim Cap rule, nor can its retroactive application be justified.

The Supreme Court has observed that "[r]etroactivity is generally disfavored in the law, in accordance with fundamental notions of justice that have been recognized throughout history[,]" *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532 (1998) (internal quotations and citations omitted), and that "'[r]etrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation . . . ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.'" *Id*. at 533 (quoting H. Broom, LEGAL MAXIMS 24 (8th ed. 1911)). The *February 8 Letter* would subvert this maxim by requiring the Petitioners to pay back significant amounts of money that we already have spent in furtherance of the Commission's universal service policies.

IV. THE *FEBRUARY 8 LETTER* DOES NOT COMPLY WITH THE REGULATORY FLEXIBILITY ACT.

As discussed in Section II, *supra*, the *February 8 Letter* constitutes a legislative rule because it orders USAC to implement a modification of the Interim Cap. Since the Interim Cap is a rule, having been prescribed by the Commission in the *Interim Cap Order* following a notice-and-comment rulemaking proceeding, the only course available to the Commission for modifying the Interim Cap is to conduct a new rulemaking proceeding.

This requirement for a rulemaking to modify the Interim Cap also imposes a duty on the Commission to prepare an initial regulatory flexibility analysis and to adopt a final regulatory flexibility analysis.[48] This duty is particularly important in this case because of the substantial adverse impact of the *February 8 Letter* on the Petitioners and many similarly situated small businesses. Because the Commission failed to prepare and publish either an initial or a final regulatory flexibility analysis, the directive in the *Letter* calling for an adjustment of the Interim Cap, and requiring debt collections from competitive ETCs, cannot be enforced against small entities covered by the Regulatory Flexibility Act.

CONCLUSION

For all the foregoing reasons, the Petitioners respectfully request the Bureau to reconsider its actions in the *February 8 Letter*, grant our Petition for Reconsideration, and refrain from requiring USAC to collect from us any portion of disbursements made to us pursuant to the *Interim Cap Order* adopted by the Commission. Alternatively, the Petitioners respectfully request the Bureau to exercise its discretion to refer the Petition to the Commission.

[48] *See* 5 U.S.C. §§ 603(a), 604(a).

Respectfully submitted,

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